BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DARCIE R. BOYER	)	
Claimant	)	
	)	
VS.	)	
	)	
SPRINT	)	
Respondent	)	Docket No. 1,052,140
	)	
AND	)	
	)	
AMERICAN CASUALTY CO. OF READING, PA	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the June 12, 2012, Award entered by Administrative Law Judge Steven J. Howard. The Board heard oral argument on January 23, 2013. Matthew L. Bretz, of Hutchinson, Kansas, appeared for claimant. Daniel N. Allmayer, of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found claimant failed to prove it was more probably true than not true that she sustained an accident as claimed. Accordingly, no benefits were awarded.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant asks the Board to reverse the ALJ's Award and find the evidence shows it is more probably true than not true that she sustained an accident arising out of and in the course of her employment with respondent and that her need for medical treatment is causally related to her work injury. Claimant asks that the matter then be remanded to the ALJ for further proceedings in accordance with the Board's Order.

Respondent argues the Award should be affirmed.

The issues for the Board's review are:

(1) Did claimant sustain an accident arising out of and in the course of her employment with respondent?

(2) Is claimant's need for medical treatment causally related to an injury suffered as a result of an injury sustained at work?

FINDINGS OF FACT

Claimant was employed by respondent as a trainee in customer service. She had only been working about 90 days when she claimed an injury to her lower back. Claimant testified that on July 28, 2010, she was walking into respondent's break room holding a glass of soda in one hand and a paper plate with pizza slices in the other hand. Claimant claims she slipped on some water on the floor by the ice machine and fell, landing on her tail bone. Claimant testified that when she slipped, she dropped her plate of pizza but did not spill any of her drink. Claimant said her drink was in a "QuikTrip" type cup with a lid and straw.

Claimant believed a man was in the break room when she fell, but she did not know who it was. She said the man went to get claimant's trainer, Jennifer West. After the man left the break room, another employee came in and helped claimant to a chair. Claimant said she was in pain but was trying to grin and bear it.

Jennifer West previously worked for respondent as a trainer in the customer service call center, and claimant was one of the trainees in her class. Ms. West said the trainees had been treated to a food day, and pizza and soda had been brought in for them. According to Ms. West, claimant got her pizza and a drink and said she was going to sit outside to eat. Later, someone came into the classroom and told Ms. West that one of her trainees had fallen in the break room. When Ms. West got to the break room, claimant was sitting in a chair. Claimant told Ms. West she had fallen but was fine, and Ms. West said claimant did not appear to be in any distress. Ms. West asked claimant about being in the break room, and claimant said her back was hurting and she wanted to sit in the break room.

Ms. West said sometime before claimant's fall, claimant had missed a day of work. When claimant came back the next day, she told Ms. West the reason she had missed work was because of back spasms.

Ms. West said that claimant seemed to grasp her training, but claimant had a problem with her attendance. Ms. West told claimant on July 23, 2010, that if she missed any more days of work, she would exceed her attendance points and would not be allowed to continue with training. Claimant denied having a problem with attendance and said no one gave her any warnings or criticized her for absenteeism. On July 28, 2010, after

claimant fell, security called for an ambulance. Ms. West told claimant that if she left work, even by ambulance, she would lose her job because of exceeding her points.

Linda Hayes-McDonald is a supervisor at respondent. Her office is close to the break room. She did not work with claimant, who was a trainee. On July 28, 2010, an employee came into her office and said someone was sitting on the floor in the break room claiming to have fallen. When Ms. Hayes-McDonald entered the break room, she saw claimant sitting on a carpeted mat in front of the ice machine. Claimant was sitting on her right leg, and her left leg was extended out and bent at the knee. It appeared as though claimant had sat down on the mat in front of the ice machine to eat there. Claimant was holding a Styrofoam cup of soda and a paper plate with slices of pizza. Ms. Hayes-McDonald said the cup in claimant's hand did not have a lid and was filled to the rim with a brown soda. After Ms. Hayes-McDonald entered the break room, claimant sat the drink down and began to eat pepperoni off the slices of pizza.

Ms. Hayes-McDonald asked claimant why she was sitting there, and claimant responded that she had fallen. Claimant told Ms. Hayes-McDonald she did not know how she had fallen without spilling the drink or dropping the pizza. Claimant said she slipped on water on the carpet, but Ms. Hayes-McDonald said the carpet was dry. She looked around but could not see any spillage of water around the ice machine. Ms. Hayes-McDonald saw a melted ice cube about six feet away from claimant, but the water from the melted ice cube did not have any smear marks as though anyone had slipped on it.

Opel Viorato-Ruiz worked for respondent in the same building as claimant. On July 28, 2010, Ms. Viorato-Ruiz entered the break room to get some water and noticed claimant sitting in the middle of a 4' x 6' safety carpet on the floor in front of the ice machine. Claimant did not say anything about being hurt. Ms. Viorato-Ruiz said claimant looked comfortable. Claimant was holding a drink in one hand and a plate with a piece of pizza in the other hand. There was no pizza or liquid on the floor. Ms. Viorato-Ruiz said claimant set her cup down and started eating the pizza. Because claimant was sitting and eating her pizza, Ms. Viorato-Ruiz did not think anything was wrong with her. A couple of minutes later, some other people entered the break room and asked claimant if she was okay, and claimant then said she had fallen. At that point, Ms. Viorato-Ruiz left the break room to get a supervisor.

Claimant's first unscheduled absence that affected her points was on June 18, 2010. She called the evening before saying she would not be able to be at work because of car problems. Claimant was gone all day June 18 and lost 10 points. On July 27, 2010, claimant called into respondent and left a voice mail saying she was having problems walking and was on her way to the hospital. Claimant was off work the entire day, and another 10 points were deducted. So by the end of July 27, claimant had 20 points deducted, and she was only allowed 15. Monika Spencer, supervisor over the trainees, said claimant was not terminated on July 28, 2010, because of the time it takes to review

all the records to be sure everything was properly entered and to give the employee an opportunity to dispute any records. Claimant was terminated on August 2, 2010.

After her fall on July 28, 2010, claimant was taken by ambulance to the emergency room at Shawnee Mission Medical Center. She was released after a couple of hours. Claimant testified she was not given any medication because she was already taking pain medication and an antibiotic because of a urinary tract infection (UTI). Claimant testified that those medications had been prescribed before her accident of July 28, 2010, after she had gone to the emergency room of North Kansas City Hospital (NKC Hospital) complaining of pain in her entire lower body from front to back and was having trouble urinating. Claimant testified the pain from her UTI did not radiate down her legs.

The medical records from NKC Hospital actually show claimant was seen in its emergency department on July 27, 2010, the day before claimant's alleged accident. The medical records of claimant's emergency room visit to NKC Hospital indicate she gave a history of awakening with persistent back pain with an onset of three days earlier. A diagram shows claimant had pain in an area from her shoulder blades to her lower back, radiating down her thighs to her knees. A physical examination showed she had mild muscle spasm and mild bilateral CVA tenderness.[1] A CT scan of her abdomen and pelvis showed she had no calcified stones at the level of the kidneys or ureters and no dilatation of the urinary collecting system. She had no evidence of an acute inflammatory process in the abdomen or pelvis. X-rays were taken of claimant's lumbar spine which showed minimal marginal osteophyte formation at L3-4. Claimant was prescribed Oxycodone for pain, a muscle relaxant, and an antibiotic. She was discharged from NKC Hospital with care instructions related to back pain and a UTI infection.

Dr. Daniel Zimmerman, a board certified independent medical examiner, examined claimant on January 21, 2011, at the request of claimant's attorney. Claimant told Dr. Zimmerman she fell at respondent's facility and landed on her tail bone, resulting in pain affecting her lumbar spine. Dr. Zimmerman reviewed records of NKC Hospital, where claimant was seen on July 27, 2010, for back pain and a UTI. He also reviewed records from Shawnee Mission Medical Center emergency room of July 28, 2010.

Dr. Zimmerman acknowledged the emergency room record from NKC Hospital concerning claimant's visit on July 27, 2010, sets out that claimant gave a history of awaking with back pain three days earlier. A diagram filled out showing claimant's discomfort indicated she had pain radiating down the lateral side of both legs. On the back side, the diagram shows claimant had pain from the shoulder blades to the low back radiating down both legs in the back. Claimant was diagnosed with a UTI and low back pain. Dr. Zimmerman said often UTI can cause low back pain. Dr. Zimmerman believed

[1] Dr. Daniel Zimmerman described CVA tenderness as tenderness over the kidneys.

the records from NKC Hospital reflected that claimant went in for a UTI and not for an injury to the lumbosacral spine.

Based upon Dr. Zimmerman's review of claimant's medical records and his physical examination, he opined that claimant suffered a permanent aggravation of osteoarthritis at L3-4 at her job at respondent. Using the AMA *Guides*[2], Dr. Zimmerman rated claimant as having a 17 percent permanent partial impairment of the whole body.

Dr. Zimmerman permanently restricted claimant to lifting 20 pounds on an occasional basis and 10 pounds on a frequent basis. He also recommended claimant avoid frequent flexing of the lumbosacral spine and thus avoid frequent bending, stooping, squatting, crawling, kneeling and twisting activities at the lumbar level. Dr. Zimmerman reviewed the task list prepared by Dr. Robert Barnett. Of the 30 tasks on the list, Dr. Zimmerman opined that claimant was unable to perform 18 for a 60 percent task loss.[3]

Dr. Terrence Pratt examined claimant on September 26, 2011, at the request of the ALJ. Claimant's chief complaint was low back pain; she complained of continuous, dull aching across her waist without true radicular symptoms, weakness, or numbness. She denied prior involvement in the lumbosacral region. After examining claimant and reviewing her medical records, Dr. Pratt diagnosed her with low back pain without significant evidence of lumbosacral radiculopathy. Using the AMA *Guides*, Dr. Pratt placed claimant in DRE Category II with a 5 percent permanent partial impairment to the whole person. Of that impairment, he opined that 3 percent was preexisting. He recommended claimant avoid frequent low back bending or twisting.

Dr. Steven Hendler is board certified in physical medicine and rehabilitation with added qualifications in pain medicine. He performed an examination and evaluation of claimant on March 19, 2012, at the request of respondent. Claimant told Dr. Hendler she was in her normal state of health until July 28, 2010, when she fell at work, landing on her tail bone. She went to the emergency room, where she was evaluated and discharged. She saw her primary care physician a day and a half later. No x-rays or testing was done, and she was released to return to work. She has had no medical treatment since then.

Dr. Hendler noted that the distribution of claimant's back pain as noted on her intake form was almost identical to the distribution of back pain she identified at the NKC Hospital emergency room the day before her injury. During that emergency room visit, claimant had a work-up to rule out kidney disease. The work-up was negative except claimant had low level pyuria and hematuria. Dr. Hendler stated that back pain sufficiently severe as to

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[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[3] Dr. Zimmerman testified claimant could not perform 19 for a 63.3 percent task loss, but a count shows that in fact there were 18 tasks that claimant could not perform.

require Oxycodone would be unusual in a UTI unless the infection was severe, which would typically be associated with pyuria, chills, fever and would require intravenous antibiotic therapy. Dr. Hendler said the results of the tests on claimant were equivocal for a diagnosis of UTI. He said before a lot of physicians will diagnose UTI, they would need to see a greater number of white and red blood cells in the urine than claimant had. Dr. Hendler opined that claimant had significant back pain prior to July 28, 2010. He stated claimant might have had an increase in her symptoms as a result of the fall of July 28, 2010, but he found nothing to suggest any permanency from the accident. Dr. Hendler said no further treatment was indicated as a result of the work event of July 28, 2010. He said claimant had degenerative joint/disc disease, but the bulk of her symptoms appeared to be myofascial in nature.

Using the AMA *Guides*, Dr. Hendler placed claimant in DRE Lumbosacral Category I, which equals a 0 percent permanent partial impairment. Dr. Hendler did not believe claimant was in need of any work restrictions as a result of the event of July 28, 2010.

Claimant was terminated by respondent a few days after her alleged accident. Ms. Spencer testified that claimant began working for respondent on June 5, 2010. She said respondent uses an attendance policy that deducts points for partial or full absences. During the 8-week period of their training, new hires are allowed a total of 15 points. Respondent deducts 10 points for each full day missed and five points for missing half a shift or less than half a shift.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[4] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[5]

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[4] K.S.A. 2010 Supp. 44-501(a).

[5] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[6]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[7] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[8]

ANALYSIS

The first issue on appeal is whether claimant suffered a personal injury by accident arising out of her employment. Claimant alleges she injured her lower back on July 28, 2010, when she slipped in a puddle of water by the ice machine while walking through the break room and fell on her tail bone. When the injury allegedly occurred, claimant was carrying a drink in one hand and a plate with pizza in the other. Claimant testified that she dropped her pizza but not the drink. Claimant testified that the cup was a "Quick Trip" type cup with a lid and a straw.

Jennifer West, a trainer in the customer call center at the time of the accident, testified that the group of trainees decided to order pizza on the day of the injury. Ms. West testified that after the pizza arrived, claimant complained that it was too cold in the training room and stated that she was going outside to warm up, smoke a cigarette and eat her pizza.

Claimant testified that a man was present in the break room and witnessed the fall. Rather than rendering aid to the claimant, who had allegedly just fallen to the floor, the

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[6] *Id.* at 278.

[7] *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P.3d 255 (2011); *Odell v. Unified School District No. 259*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[8] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

man went to tell her supervisor. No one can identify the man who allegedly witnessed the accident.

Opel Viorato-Ruiz, an employee for respondent, entered the break room and found claimant sitting on the floor in front of the ice machine. Ms. Viorato-Ruiz testified that because claimant was sitting there eating her pizza, she did not think anything was wrong. Ms. Viorato-Ruiz stated that only after some other employees entered the break room did the claimant say she had fallen. Linda Hayes-McDonald also testified that when she arrived claimant she was sitting on the floor eating pizza. It is interesting to note that even though claimant dropped her pizza on the floor, she continued to eat the pizza.

Contrary to claimant's testimony regarding the type of cup she was carrying, Linda Hayes-McDonald testified that the cup was Styrofoam and was filled to the brim with brown liquid. Ms. Hayes-McDonald asked claimant how she fell without spilling her drink or dropping her pizza. Claimant responded by saying she did not know.

Ms. West testified that someone came into the classroom and told her that one of her trainees had fallen in the break room. Ms. West went to the break room and found claimant sitting in a chair. Ms. West stated that claimant "looked fine."[9] Ms. West asked claimant how she got to the break room, because she had told everyone that she was going outside. Ms. West testified that claimant said her back was hurting so she wanted to just sit in the break room. Apparently, claimant's back was hurting before she allegedly fell at work.

The record supports that claimant's back indeed did hurt prior to the accident. Dr. Hendler's records review shows that on July 27, 2010, the day before the alleged work injury, claimant went to the emergency department at NKC Hospital. Dr. Hendler wrote that clamant had awakened with back pain three days earlier, thinking she had slept wrong. Claimant described dull pain extending from the bottom of the shoulder blades to the upper buttocks in the central portion of the back and then radiating into both thighs. Claimant showed pain in the mid to low back, radiating down the back and side of both legs. Dr. Hendler also noted that claimant went to "MedAct" on the date of the accident and reported back pain of two days duration. Claimant was transported from MedAct to Shawnee Mission Medical Center. At Shawnee Mission Medical Center, claimant was noted to have pain throughout the lower back which started either three to five days prior and worsened after a fall one hour prior to the evaluation.

Claimant testified that she did not have a problem with absenteeism and that no one had given her warnings about absences. When Linda Hayes-McDonald talked to claimant in the break room after the alleged injury, she asked claimant if she wanted to go to the emergency room, and claimant responded by saying that she could not miss work because

[9] West Depo. at 6.

she did not have any points. Claimant's response to Ms. Hayes-McDonald's inquiry is consistent with the testimony of Jennifer West. Ms. West testified that on July 23, 2010, she warned claimant that if she missed any more days she would be terminated. The ALJ found that claimant knew she was about to be terminated for excessive absences, or "saw the handwriting on the wall."[10]

The claimant's burden of proof must be sustained by a preponderance of the credible evidence.[11] The ALJ found that the claimant's testimony regarding the accidental injury was not credible. The Board has, in the past, given some deference to an administrative law judge's opportunity to observe the live testimony of witnesses.[12]

CONCLUSION

Giving due deference to the findings of the Administrative Law Judge, together with the testimony of the witnesses and the exhibits admitted into evidence, the Appeals Board finds that claimant has failed to sustain her burden to prove by a preponderance of the credible evidence the conclusion that a work-related accident occurred.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven J. Howard dated June 12, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2013.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

[10] ALJ Award (June 12, 2012) at 9.

[11] *Speer v. Sammons Trucking*, 35 Kan. App. 2d 132, Syl. ¶ 2, 128 P.3d 984 (2006).

[12] *Sierks v. David Bindi Construction*, Docket No. 1,023,924, 2006 WL 3298943 (Kan. WCAB Oct. 19, 2006).

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Steven J. Howard, Administrative Law Judge